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In the Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-1766

UNITED STATES OF AMERICA, PETITIONER

v.

RICHARD M. NIXON, PRESIDENT OF THE UNITED STATES, ET AL., RESPONDENTS

No. 73-1834

RICHARD M. NIXON, PRESIDENT OF THE UNITED STATES, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

SUPPLEMENTAL BRIEF FOR THE UNITED STATES ON APPELLATE JURISDICTION

QUESTIONS PRESENTED

1. Whether the District Court order of May 20, 1974, requiring the President to submit certain evidence to the court for *in camera* inspection, is an appealable order.

2. Whether this Court has jurisdiction to entertain and decide the petition for mandamus, seeking review of the district court's order requiring the President to submit certain evidence to the court for *in camera* inspection, transmitted to this Court by the Court of Appeals.

CONSTITUTIONAL PROVISION AND STATUTES INVOLVED

Article III, Section 2 of the Constitution of the United States provides in pertinent part—

> The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;—to all Cases affecting Ambassadors, other public Ministers and Consuls;—to all Cases of admiralty and maritime Jurisdiction;—to Controversies to which the United States shall be a Party;—to Controversies between two or more States;—between a State and Citizens of another State;—between Citizens of different States,—between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.
>
> In all Cases affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be Party, the supreme Court shall have original jurisdiction. In all the other Cases before mentioned, the supreme Court shall have appellate Jurisdiction, both as to Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make.
>
> * * * * * *

Section 1254 of Title 28 of the United States Code provides in pertinent part—

> Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:
>
> (1) By writ of certiorari granted upon the petition of any party to any civil or criminal case before or after rendition of judgment or decree;

* * * * *

Section 1651(a) of Title 28 of the United States Code provides—

> The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law.

Section 2101(e) of Title 28 of the United States Code provides—

> An application to the Supreme Court for a writ of certiorari to review a case before judgment has been rendered in the court of appeals may be made at any time before judgment.

INTRODUCTION

The United States files this Supplemental Brief on Appellate Jurisdiction in response to the order of this Court of June 15, 1974, requesting the parties to brief and argue, in addition to the questions presented by the petition for certiorari (No. 73–1766), the cross-petition for certiorari (No. 73–1834) and the petition for a writ of mandamus filed in the court

of appeals (D.C. Cir. No. 74–1532), the following questions:

> (a) Is the District Court order of May 20, 1974, an appealable order?
>
> (b) Does this Court have jurisdiction to entertain and decide the petition for mandamus transmitted by the Court of Appeals to this Court?

The United States respectfully submits that both questions must be answered affirmatively and that the jurisdiction of this Court to review the decision of the district court rests alternatively on 28 U.S.C. 1254(1) and 1651.

STATEMENT

On May 24, 1974, pursuant to 28 U.S.C. 1651 and Rule 21(a) of the Federal Rules of Appellate Procedure, the President filed in the court of appeals a petition for a writ of mandamus seeking an order directing the district court to vacate its order of May 20, which had denied the President's motion to quash the subpoena *duces tecum* and his motion to expunge the grand jury's naming of him as an unindicted co-conspirator and which had ordered compliance with the subpoena. The petition was duly docketed in the court of appeals and assigned Docket Number 74–1532. On the same day, the President filed a notice of appeal from the district court's order and the district court record was docketed in the court of appeals under Docket Number 74–1534.

Later on May 24, the United States filed a petition for certiorari before judgment (No. 73–1766) seeking review of those cases in the court of appeals and

describing five questions presented by those cases, including questions that covered the issues raised by Issue (b) of the President's mandamus petition in the court of appeals, relating to the district court's order overruling the claim of privilege and ordering compliance with the subpoena. The President's cross-petition for a writ of certiorari before judgment (No. 73–1834), filed on June 6, 1974, raises the question presented as Issue (d) in the mandamus petition, involving the district court's refusal to expunge the grand jury's finding concerning the President. Issue (a) of the mandamus petition, relating to the jurisdiction of the district court to decide an "intra-executive dispute," was not explicitly presented as a question in either certiorari petition, but is being addressed in the briefs in this Court as a jurisdictional issue.

Issue (c) of the mandamus petition, relating to the application of *Brady* v. *Maryland*, 373 U.S. 83, to privileged material not in the prosecutor's possession, is not raised separately in either petition. The district court expressly refused to pass upon that question as a ground for ordering compliance with the subpoena, and it is doubtful that it was properly before the court of appeals. Thus, the three viable issues raised in the President's petition for mandamus are "fairly comprised" within the questions framed by the parties in seeking certiorari before judgment. See Sup. Ct. Rule 23(c).

It is our contention that the May 20 order of the district court is properly before this Court for review on two distinct, independent grounds. First, we believe the order of the district court is appealable under 28

U.S.C. 1291, and since an appeal had been taken to the court of appeals, this Court has jurisdiction under 28 U.S.C. 1254(1) to review the order before judgment in the court of appeals. Second, this Court also has jurisdiction under 28 U.S.C. 1254(1) to consider the President's petition for a writ of mandamus, which was pending in the court of appeals, and is fairly comprehended by the questions presented in the petition and cross-petition for certiorari.

In any event, the Court has adequate jurisdiction to resolve the issues presented under the All Writs Act, 28 U.S.C. 1651, which empowers this Court to issue common law writs of certiorari or writs of mandamus to review directly decisions of district courts in extraordinary cases.

ARGUMENT

I

THE ORDER OF THE DISTRICT COURT REQUIRING THE PRESIDENT TO PRODUCE EVIDENCE FOR IN CAMERA INSPECTION IS APPEALABLE

Ordinarily, of course, an order like the one presented for review—requiring the production of evidence pursuant to a subpoena *duces tecum* and denying a motion to quash—is not considered a final order appealable under 28 U.S.C. 1291. In such cases, the person to whom the subpoena is directed "must either obey its commands or refuse to do so and contest the validity of the subpoena if he is subsequently cited for contempt on account of his failure to obey." *United States* v. *Ryan,* 402 U.S. 530, 532. See also *Cobbledick* v. *United States,* 309 U.S. 323; *Alexander* v. *United*

States, 201 U.S. 117. As this Court held in *Cohen* v. *Beneficial Industrial Loan Corp.,* 337 U.S. 541, 546, however, Section 1291 must be given a "practical rather than a technical construction." The compelling circumstances of this case—where the person to whom the subpoena is directed is the President of the United States—require an exception to this judicially constructed rule that normally governs the timeliness of an appeal from the enforcement of a subpoena. See *Nixon* v. *Sirica,* 487 F. 2d 700, 707 n. 21 (D.C. Cir. 1973) (*en banc*).

Even though an order enforcing a subpoena *duces tecum* issued to a third-party witness in a criminal proceeding effectively determines that party's interests in a matter collateral to the prosecution and, as a practical matter, is a final order, the interests in the orderly administration of justice have led this Court to hold that such an order is not appealable. There can be no question that if such orders were routinely appealable, there would be interminable delays in nearly every criminal case while third-party witnesses litigated their obligation to provide evidence. Thus, "the necessity for expedition in the administration of the criminal law justifies putting one who seeks to resist the production of desired information to a choice between compliance with a trial court's order to produce prior to any review of that order, and resistance to that order with the concomitant possibility of an adjudication of contempt if his claims are rejected on appeal." *United States* v. *Ryan, supra,* 402 U.S. at 533. In the circumstances of this case, however, that "choice" not only would be wholly inappropriate, but

most likely would defeat the very purpose of *Ryan*—expedition of the criminal process. There is certainly no statutory obstacle to treating the ordinary timeliness rule as inapplicable here, since as this Court reaffirmed quite recently, the final order rule of 28 U.S.C. 1291 "does not limit appellate review to 'those final judgments which terminate an action.'" *Eisen* v. *Carlisle & Jacquelin*, —— U.S. —— (42 U.S.L.W. 4804, 4808, May 28, 1974), citing *Cohen* v. *Beneficial Loan Corp., supra*, 337 U.S. at 545.

Although it is an open question whether the President is legally and constitutionally subject to citation for civil or criminal contempt of court,[1] no one would question that such a course would be radical and, even if constitutionally feasible, should be avoided if at all possible while still maintaining the integrity of the courts and the administration of justice. This was the crucial factor in leading the Court of Appeals for the District of Columbia Circuit to state that despite *Ryan*, an order requiring the President to submit evidence for *in camera* inspection under a subpoena is appealable. "In the case of the President, contempt of a judicial order—even for the purpose of enabling a constitutional test of the order—would be a course unseemly at best." *Nixon* v. *Sirica, supra*, 487 F.

[1] But see *Land* v. *Dollar*, 190 F. 2d 623 (D.C. Cir. 1951), vacated as moot, 344 U.S. 806 (cabinet officers held in contempt for refusing on directions of the President to obey court order); *United States* v. *Isaacs and Kerner*, 493 F. 2d 1194 (7th Cir. 1974), cert. denied, — U.S. — (June 17, 1974) (impeachable officer liable to criminal conviction prior to impeachment and removal).

2d at 707 n.21.[2] The courts simply as a matter of comity between the Branches should not place the President in the position of having to suffer a contempt citation—itself an inevitable subject of consitutional litigation—in order to secure review of such an order directed to him. Nor, as a matter of discretion, should they invite a situation where they will be called upon to decide whether the President in fact can be held in contempt if he declines to obey the lower court order.

It goes without saying that this is one of that "small class" of cases where the issues finally determined by the district court are "too important to be denied review and too independent of the cause itself to require that appellate consideration be deferred until the whole case is adjudicated." *Cohen* v. *Beneficial Industrial Loan Corp., supra,* 337 U.S. at 546. Unlike the ordinary litigation concerning a subpoena *duces tecum,* the basic constitutional issues involved in this case have not been decided definitively by this Court. Since the evidence sought in the subpoena, as we demonstrate in Parts III(B) and V of our Brief, is highly material to the prosecution in *United States* v. *Mitchell, et al.,* these issues require prompt resolution by this Court. Finally, it would be hard to envision a case which belongs to a smaller class—a

[2] In an *en banc* order entered on June 18, 1974, the court of appeals held that a district court order, entered in the interim, overruling a Presidential claim of executive privilege for a specific subpoenaed item is appealable, and ordered the President's mandamus petition, seeking review of that order, docketed as an appeal. *Nixon* v. *Sirica* (D.C. Cir. No. 74-1618).

case where a subpoena has issued to *and* compliance ordered against the President.

The rule established by *Ryan* and *Cobbledick*, every bit as much as the *Cohen* rule or the recent holding in *Eisen*, reflects an "evaluation of the competing considerations underlying all questions of finality—'the inconvenience and costs of piecemeal review on the one hand and the danger of denying justice by delay on the other.'" *Eisen* v. *Carlisle and Jacquelin*, *supra*, 42 U.S.L.W. at 4808. The "evaluation" here shows that this case is clearly distinguishable even from the cases where third-party witnesses are ordered to produce evidence and mandates clearly that the order of the district court be construed as a final order appealable under 28 U.S.C. 1291.

II

THIS COURT HAS JURISDICTION TO ENTERTAIN AND DECIDE THE PETITION FOR MANDAMUS TRANSMITTED BY THE COURT OF APPEALS TO THIS COURT

By its order of June 15, 1974, this Court also directed the parties to address the question whether it has "jurisdiction" to entertain and decide the petition for a writ of mandamus transmitted by the court of appeals as part of the record on certiorari. In our view, this Court unquestionably has such jurisdiction.

A. REVIEW OF THE MANDAMUS PETITION IS AUTHORIZED BY 28 U.S.C. 1254(1)

We begin by noting that under the All Writs Act, 28 U.S.C. 1651(a), the court of appeals (like this

Court) has jurisdiction to issue "all writs necessary or appropriate in aid of" the court's jurisdiction and "agreeable to the usages and principles of law." In view of the extraordinary nature of proceedings seeking to order the President to comply with a subpoena *duces tecum*, the court of appeals held in *Nixon* v. *Sirica*, *supra*, 487 F. 2d at 706–07, that the normal predicate for seeking review of such an order—suffering a contempt adjudication—was inappropriate, and that, to the extent an appeal could not be supported, immediate exercise of the court's "review power under the All Writs Act" was warranted, "particularly in light of the great public interest in prompt resolution of the issues that his petition presents." 487 F. 2d at 707 (footnotes omitted). That ruling, based on the court's review of the numerous decisions of this Court dealing with mandamus, was unquestionably within the Court's statutory power and reflects a legitimate exercise of discretion. See generally *Will* v. *United States*, 389 U.S. 90; *Schlagenhauf* v. *Holder*, 379 U.S. 104; *Roche* v. *Evaporated Milk Ass'n*, 319 U.S. 21; *United States* v. *United States District Court*, 444 F. 2d 651, 655–56 (6th Cir. 1971), aff'd, 407 U.S. 297, 301 n.3. In seeking review of the May 20, 1974 order by mandamus, the President was following the course marked out by the court of appeals, and that court had statutory jurisdiction to entertain the petition.

This Court's jurisdiction to review that mandamus case on certiorari is similarly clear. Under 28 U.S.C.

1254(1) the Court has jurisdiction to review "cases in the court of appeals":

> By writ of certiorari granted upon the petition of *any* party to *any* civil or criminal case, before or after rendition of judgment or decree. (Emphasis added.)

This congressional vesting of jurisdiction under Article III of the Constitution is plainly sufficient. We see no room to doubt that a duly docketed petition for mandamus comes within the scope of "any case" pending in the court of appeals. As the Court stated in *Gay* v. *Ruff*, 292 U.S. 25, 30, the power given to review cases before judgment in the court of appeals is "unaffected by the condition of the case as it exists in the circuit court of appeals; * * * the sole essential of this Court's jurisdiction to review is that there be a case pending in the circuit court of appeals." There is no reason to believe that when Congress used the term "any civil or criminal case" in Section 1254(1) it intended to limit the Court's power to reviewing district court cases that were brought to the court of appeals by way of appeal and to exclude cases involving mandamus applications to review those cases. The language of the statute covers mandamus cases, and the policy reasons for authorizing expedited review apply with at least equal force to such applications. See Sup. Ct. Rule 20.

Although issue had not been joined in the court of appeals by a request for a response to the mandamus petition under Rule 21(b), Federal Rules of Appellate Procedure, the certiorari petitions were timely. Section 2101(e) provides that an application for certiorari before judgment has been rendered by a court of appeals may be made "at any time" before judg-

ment, and the cases in which this expedited procedure has been followed typically are in the most preliminary stages of docketing when review is applied for and granted by this Court.[3]

As we pointed out in our petition for a writ of certiorari, the statutory authority to grant review before judgment on the application of "any party" to the case in the court of appeals has been used on prior occasions to bring a case up for review on the application of the party that had prevailed in the district court, as in the present case. See *Youngstown Sheet & Tube Co.* v. *Sawyer,* 343 U.S. 579; *United States* v. *United Mine Workers,* 330 U.S. 258, 269; *United States* v. *Bankers Trust Co.,* 294 U.S. 240.[4]

B. THE COURT HAS APPELLATE JURISDICTION UNDER ARTICLE III

Nor is there any doubt that this statutory authority is a valid exercise of the Congressional power to regulate the *appellate* jurisdiction of this Court under Article III of the Constitution. Although a petition for a writ of mandamus—whether applied for in the court of appeals or in this Court—is in a sense a new proceeding, it has been settled since *Marbury* v. *Madison,* 1 Cranch 137, that mandamus to review the action of an inferior court is an exercise of the Court's *appellate* jurisdiction. In that case, Chief Justice Marshall stated, as the "essential criterion of appellate jurisdiction, that it revises and corrects the proceedings in a cause already instituted, and does not

[3] See Stern & Gressman, *Supreme Court Practice* § 2.3, at 28 (4th ed. 1969).

[4] The application of this statute to a petition by the party prevailing in the district court was demonstrated in the government's petition in *Bankers Trust.* No. 471, O.T. 1934, at 11–16.

create that cause." 1 Cranch at 175. As Justice Harlan explained in his lengthy concurring opinion, discussing similar issues, in *Chandler* v. *Judicial Council of the Tenth Circuit,* 398 U.S. 74, 96:

> Beyond cavil, the issuance of a writ of mandamus to an inferior *court* is an exercise of appellate jurisdiction. In re Winn, 213 U.S. 458, 465–466. (Emphasis in original.)

For this reason, the Court regularly has entertained and decided "original" petitions for writs of mandamus directed to district courts in the exercise of what is, under Article III, the Court's appellate jurisdiction. See, *e.g., McCullough* v. *Cosgrave,* 309 U.S. 634 (per curiam); *Ex parte Peru,* 318 U.S. 578, 582–83; *Ex parte United States,* 287 U.S. 241, 245–49. Indeed, Rule 30 of this Court's Rules expressly recognizes the Court's power to issue extraordinary writs like mandamus, which necessarily involve a valid exercise of appellate jurisdiction when review of a lower court's decision is sought thereby. It follows, *a fortiori,* that this Court has constitutional jurisdiction to exercise the authority conferred by Section 1254(1) to consider, before judgment, the mandamus case filed in the court of appeals, since the object of the Court's review is identical: to set aside, modify or leave undisturbed the district court's order. See 28 U.S.C. 2106.[5]

[5] Whether Section 1254(1) applies to petitions filed in courts of appeals for direct review of administrative agency decisions and whether review of such petitions before judgment of the court of appeals would come within this Court's appellate jurisdiction under Article III are distinct questions that need not be addressed in this case, where the Court is being called upon to review an order of a lower federal court. See generally Stern & Gressman, *supra,* § 2.3, at 29–30.

C. ALTERNATIVELY, JURISDICTION CAN BE RESTED ON THE ALL WRITS ACT, 28 U.S.C. 1651(a)

Finally, we note that, if for some reason the Court concludes that the mandamus petition was not properly a "case" pending "in" the court of appeals, so as to fit within the statutory certiorari-before-judgment provision in Section 1254(1), this Court would still have ample jurisdiction to entertain and decide the issues raised and briefed by the parties. All of the same issues, of course, are raised by the President's duly docketed appeal to the court of appeals. In addition, even if there is some defect with that appeal (but see part I, above), the Court still has an adequate basis for jurisdiction. As expressly recognized by this Court's Rule 31(2), the All Writs Act, 28 U.S.C. 1651(a), authorizes the Court to issue extraordinary writs like the "common law writ of certiorari" to a lower court, and this power has been used when cases were found not to be pending "in" a court of appeals. See, *e.g., House* v. *Mayo,* 324 U.S. 42, 44; *Matter of 620 Church St. Building Corp.,* 299 U.S. 24, 26. See also *United States Alkali Export Ass'n* v. *United States,* 325 U.S. 196; *DeBeers Consolidated Mines Ltd.* v. *United States,* 325 U.S. 212. In addition, the Court could treat the President's cross-petition for certiorari before judgment as an application for an "original" writ of mandamus to review the district court's order directly. See *McCullough* v. *Cosgrave, supra; Ex parte Peru, supra; Ex parte United States, supra.* Since review of an order of a district court is sought, such review comes within the "appellate" jurisdiction under Article III. The circumstances of

the present case, as measured by the criteria followed by the Court in other cases, certainly show that the use of an extraordinary writ, if necessary, is warranted to resolve promptly the major constitutional issues raised by this important litigation.

CONCLUSION

The Court has jurisdiction over the issues raised in the petitions for writs of certiorari before judgment, and the judgment of the district court should be affirmed on the merits for the reasons set forth in our main brief.

Respectfully submitted.

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